

*Bortnikov v. INS*, no. 02-70279

APR 3 2003

Paez, J., dissenting.

CATHY A. CATTERSON

U.S. COURT OF APPEALS

Because I do not believe that substantial evidence supports the BIA's finding that "Pamyat members attacked Bortnikov *solely* because they believed that he possessed a criminally inculpatory videotape," I respectfully dissent. Both the record and our precedent compel the conclusion that by presenting credible testimony that his persecution was "on account of" a protected ground, Bortnikov established his eligibility for asylum.

"[I]t is often difficult to determine the exact motive . . . for which harm has been inflicted." *In Re S- P-*, 21 I. & N. Dec. 486, 492 (BIA 1996). In consequence, an asylum applicant need only "provide *some* evidence of [motive], direct or circumstantial." *INS v. Elias-Zacharias*, 502 U.S. 478, 483 (1992) (emphasis in original). It is well established that an applicant may qualify for asylum where persecution occurred for multiple reasons, as long as "the harm was motivated, at least in part, by an actual or implied protected ground." *Borja v. INS*, 175 F.3d 732, 736 (9th Cir. 1999) (en banc); *see also In Re S- P-*, 21 I. & N. Dec. at 494–95. Here, the evidence compels a finding that Bortnikov's political opinion and religion furnished significant motivation for the persecution he suffered.

Before Bortnikov revealed his political opinion, the only consequence of his capture of Pamyat's coup attempt on tape was his suspension from work. When Pamyat members came to his apartment to demand the tape, Bortnikov accused them of being fascists and killing people. Only then did they physically attack him, beating him with a metal pipe until he was unconscious. This physical attack and the ongoing threats against his life did not occur until Bortnikov revealed his political opinion to the Pamyat members.

Thus, this case is closely analogous to *Borja*, where we held that mixed motives led to the petitioner's persecution. 175 F.3d at 737. Borja had refused to become a member of the New People's Army, telling them that she was opposed to them politically. To avert their wrath, she acceded to their extortionary demands. *Id.* at 734–36. We held that her persecution was motivated not only by economic extortion, but also by political opinion. *Id.* at 736. We based this conclusion upon the temporal sequence: “We know that the NPA agents acted in direct response to her statement of political opposition and revulsion at their methods because their immediate reaction was to ‘get mad’ and point a gun at her.” *Id.*

Likewise, in *Gonzalez-Neyra v. INS*, the petitioner was initially chosen as a target for extortion because of his wealth, but once he told the extortionists that he

refused to support the Shining Path, they threatened to kill him. 122 F.3d 1293, 1296 (9th Cir. 1997), *as amended*, 133 F.3d 726 (1998). “[T]he fact that the guerrillas may have initially chosen Gonzalez-Neyra as a target for money because he was a successful businessman” did not prevent us from finding that his persecution was on account of political opinion. *Id.* at 1296.

Bortnikov’s situation is closely parallel. Although Bortnikov was initially approached in an attempt to confiscate the tape, his subsequent persecution was based at least in part on the political opinion that he voiced. Like Borja, Bortnikov’s statement of political opinion was met with an immediate escalation of hostility. “Only by closing one’s eyes to the escalating nature of this confrontation could one see the ensuing events as strictly economic with no political component.” *Borja*, 175 F.3d at 737.

Moreover, although the majority is correct in stating that the attack of someone who is Jewish by an anti-Semitic organization is not alone sufficient to establish persecution on account of religion, here, Pamyat members used anti-Semitic slurs on a number of occasions while issuing threats to Bortnikov’s family that he would be killed if he returned to Russia. This evidence compels the conclusion that Bortnikov’s Jewish ancestry was a factor in the ongoing threats, lending an additional element of hatred and willingness to commit violence to the

actions of this anti-Semitic organization.<sup>1</sup> See, e.g., *Duarte de Guinac v. INS*, 179 F.3d 1156, 1162 (9th Cir. 1999) (noting that on account of prong was satisfied where persecution was “coupled with explicit expressions of ethnic hatred”); *Maini v. INS*, 212 F.3d 1167, 1176 (9th Cir. 2000) (finding on account of prong to be satisfied by beatings coupled with explicit expressions of religious hatred).

Because “the evidence compels a finding that [protected characteristics of the petitioner were] a significant motivation for the violence and abuse he endured,” *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1096 (9th Cir. 2000), Bortnikov has demonstrated that he suffered past persecution. This showing of past persecution raises an un rebutted presumption that Bortnikov would be in danger of persecution upon return to Russia. *Borja*, 175 F.3d at 737–38. Thus, I would conclude that Bortnikov is eligible for asylum and grant the petition.

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<sup>1</sup>The INS implies that the absence of evidence that Bortnikov legally adopted his mother’s Jewish nationality renders him insufficiently Jewish to suffer from anti-Semitism. Brief for Respondent, 27 n.9. This suggestion reflects a troubling lack of understanding of the history of Eastern European and Russian anti-Semitism.